

Christopher R. Bush CS SBN 243471  
The Law Office of Chris Bush  
2727 Camino del Rio South, Suite 135  
San Diego, CA 92108  
Tel. (619) 678-1134  
chris@chrisbushlaw.com

Attorney for Debtor

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

IN RE:  
CESAR MEDINA  
KRYSTAL ANNE MEDINA

Case No. 17-05276-LT  
Chapter 7

KRYSTAL ANNE MEDINA

Plaintiff,

vs.

NATIONAL COLLEGIATE STUDENT  
LOAN TRUST 2006-3;  
Defendant.

Adversary No. 19-90065-LT

**PLAINTIFF'S MEMORANDUM OF  
LAW IN OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

## TABLE OF CONTENTS

<b>I.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>II.</b>	<b>BACKGROUND.....</b>	<b>2</b>
	<b>A. Early Years: Nonprofits, The Higher Education Act, and the <i>Quid Pro Quo</i>.....</b>	<b>2</b>
	<b>B. Alternative Loans, Multi-Party Agreements, and TERI.....</b>	<b>12</b>
	<b>C. FMC, Direct-to-Consumer Loans, and the National Collegiate Trust.....</b>	<b>15</b>
<b>III.</b>	<b>ARGUMENT AND POINTS OF AUTHORITY.....</b>	<b>18</b>
	<b>A. Summary of Argument.....</b>	<b>18</b>
	<b>B. Section 523(a)(8)(A)(i) does not except from discharge high-interest commercial loans made and held by for-profit entities.....</b>	<b>18</b>
	<b>C. TERI Was Not A <i>Bona Fide</i> Nonprofit under Section 523(a)(8).....</b>	<b>20</b>
	<b>D. There Is No Evidence That TERI Guaranteed The NCSLT Loan.....</b>	<b>24</b>
<b>IV.</b>	<b>CONCLUSION.....</b>	<b>25</b>

## TABLE OF AUTHORITIES

### **Cases**

<i>Becirevic v. Navient Solutions, LLC</i> , 2019 WL 4046770 (E.D. Tex. 2019).....	5
<i>First Marblehead Corp. v. House</i> , 541 F.3d 36 (1st Cir. 2008).....	22
<i>Bates v. United States</i> , 522 U.S. 23 (1997).....	19
<i>Crowley v. TVSM, Inc.</i> , 1991 WL 267868 (S.D.N.Y. 1991) .....	25
<i>Est of Hawaii v. C.I.R.</i> , 71 T.C. 1067 (Tax Court 1979), <i>aff'd</i> 647 F.2d 170 (9 <sup>th</sup> Cir. 1981) .....	21
<i>Frank Lloyd Wright Foundation v. Kroeter</i> , 697 F.Supp.2d 1118 (D. Ariz. 2010).....	21
<i>In re Adamo</i> , 619 F.2d 216 (2 <sup>nd</sup> Cir. 1980) .....	21
<i>In re Bolen</i> , 287 B.R. 127 (D. Vt. 2002) .....	13
<i>In re Brunner</i> , 46 B.R. 752, 755 (S.D.N.Y. 1985), <i>aff'd</i> 831 F.2d 395 (2 <sup>nd</sup> Cir.) ...	6
<i>In re Campbell</i> , 547 B.R. 49 (Bkrtcy.E.D.N.Y. 2016) .....	19
<i>In re Dube</i> , 169 B.R. 886 (Bkrtcy. N.D. Ill. 1994) .....	21
<i>In re Hammarstrom</i> , 95 B.R. 160 (Bkrtcy.N.D.Cal. 1989) .....	1,14-15
<i>In re Golden</i> , 596 B.R. 239 (Bkrtcy. E.D.N.Y. 2019) .....	2
<i>In re Goldstein</i> , 2012 WL 7009707 (Bkrtcy.N.D.Ga. 2012) .....	11
<i>In re O'Brien</i> , 318 B.R. 258 (S.D.N.Y. 2004) .....	20
<i>In re O'Brien</i> , 419 F.3d 104 (2 <sup>nd</sup> Cir. 2005). .....	21
<i>In re Murphy</i> , 282 F.3d 868 (5 <sup>th</sup> Cir. 2002) .....	2
<i>In re Pilcher</i> , 149 B.R. 595 (9th Cir.BAP1993). .....	1,15
<i>In re Stein</i> , 218 B.R. 281 (Bkrtcy. D. Conn. 1998) .....	16
<i>In re The Education Resources Institute, Inc.</i> , 442 B.R. 20 (Bkrtcy. D. Mass. 2010).....	17
<i>In re The First Marblehead Corp. Securities Litigation</i> , 639 F.Supp.2d 145 (D. Mass.2009) .....	17
<i>Living Faith, Inc. v. C.I.R.</i> , 950 F.2d 365 (7 <sup>th</sup> Cir. 1991) .....	23
<i>Shinde v. Nithyananda Foundation</i> , 2015 WL 12732434 (C.D. Cal. 2015).....	21
<i>Lowry Hospital Association v. C.I.R.</i> , 66 T.C. 850 (Tax Court 1976).....	21
<i>Matter of Williamson</i> , 25 B.R. 49 (Bkrtcy. Ga. 1982). .....	5

1	<i>Matter of Bruce</i> , 3 B.R. 77 (Bankr. Ill. 1980) .....	5
2	<i>McClure v. U.S.</i> , 95 F.2d 744 (9th Cir. 1938) .....	11
3	<i>Matter of Roberson</i> , 999 F.2d 1132 (7th Cir. 1993) .....	19
4	<i>New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New</i>	
5	<i>Jersey State Bd. of Higher Educ.</i> , 654 F.2d 868 (3 <sup>rd</sup> Cir. 1981) .....	10
6	<i>Oliver Schools, Inc. v. Foley</i> , 881 F.Supp. 847 (W.D.N.Y. 1994) .....	4
7	<i>P.L.L. Scholarship Fund v. C.I.R.</i> , 82 T.C. 196 (Tax Court 1984) .....	7
8	<i>Redlands Surgical Services v. C.I.R.</i> , 242 F.3d 904 (9 <sup>th</sup> Cir. 2001) .....	22
9	<i>Student Loan Marketing Ass’n v. Riley</i> , 104 F.3d 397 (D.C. Cir. 1997) .....	12
10	<i>Town of Brookline v. Gorsuch</i> , 667 F.2d 215 (1 <sup>st</sup> Cir. 1981) .....	21
11	<i>Texas Trade School v. C.I.R.</i> , 30 T.C. 642 (Tax Court 1958) .....	23
12	<i>Zimmerman v. Cambridge Credit Counseling Corp.</i> , 409 F.3d 473(1 <sup>st</sup> Cir. 2005) 21	

### Statutes and Regulations

14	11 U.S.C. §523 (a)(8) .....	stet
15	11 U.S.C. § 541(f) .....	20
16	14 U.S.C. § 2772.....	8
17	20 USC § 1141 .....	20
18	20 U.S.C. § 1071.....	4
19	20 U.S.C. 1087gg. ....	5
20	34 CFR 682.100 .....	6
21	34 CFR s 668.1 (1984) .....	7,11
22	34 CFR s 668.1 (1987) .....	11
23	34 CFR 674.1 .....	10,20
24	34 C.F.R. § 675.2 .....	20

### Legislative Records

27	H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 5963 .....	5-6
28	P.L. 95-598, Nov. 6, 1978, 92 Stat 2549.....	7
	P.L. 96-56. Aug 14, 1979, 93 Stat 387.....	7

1	P.L. 101–239, December 19, 1989, 103 Stat 2106 .....	8
2	P.L. 96–374, Oct 3, 1980, 94 Stat 1367.....	7-9
3	S. REP. 96-230, 1979 U.S.C.C.A.N. 936 .....	7-9
4	Pub. L. 99–498, 100 Stat 1268.....	9
5	Bankruptcy Improvement Act: Hearing on P.L. 98-353 Before the S. Comm. on	
6	Judiciary, at 328 (April 6, 1983) (Comments on Subtitle I of S. 445). ....	11

## **Administrative Reports and Rulings**

8	CFPB, PRIVATE STUDENT LOANS, 2012 .....	16
9	REVENUE RULING, 63-220, 1963 WL 13199 (IRS 1963) .....	2-4
10	REVENUE RULING 61-87, 1961 WL 12644 (1961) .....	4
11	GENERAL COUNSEL MEMORANDUM, 1987 WL 430206 .....	13
12	PRIVATE LETTER RULING 9237027, 1992 WL 223684 (IRS 1992) .....	13
13	PRIVATE LETTER RULING 9740004, 1997 WL 607382 (IRS 1997) .....	13

## **Secondary Sources**

16	Bradley, Tobin, <i>Nonprofit Student Lenders and Risk Retention</i> , 64 Baylor L. Rev.	
17	158 (2012) .....	3-4
18	Brown, Tom, <i>FBR’s Latest First Marblehead Downgrade Makes No Sense</i> ,	
19	Seeking Alpha (Nov. 28, 2007) .....	17
20	Dash, Eric, <i>Reeling In the College Bound</i> , N.Y. Times (Sept. 2, 2007) .....	16
21	Reuters, <i>Moody’s Downgrades First Marblehead Student Loan Notes</i> , (Mar. 26,	
22	2008) .....	17
23	Rossman, Mathew, <i>Evaluating Trickle Down Charity</i> , 79 Brook. L. Rev. 1455,	
24	1495 (2104) .....	2
25	Stempel, Jonathan, <i>First Marblehead Sinks, Guarantor is Bankrupt</i> (Apr. 9, 2008)	
26	.....	17

## I. STATEMENT OF THE CASE

Defendant argues that the debt incurred by Plaintiff (“NCSLT Loan”) was guaranteed by TERI, a defunct 501(c), and is therefore non-dischargeable under section 523(a)(8)(A)(i) as an “educational loan . . . made under any program funded in whole or in part . . . by a nonprofit institution.” Defendant claims that TERI guaranteed the loan, and that Congress intended the term “funded” to capture any 501(c) that plays “any meaningful part” in making a loan. Defendant’s argument rests on a misapplication of the statute and is otherwise unsupported by its evidence.

First, the clause “made under any program funded in whole or in part by a nonprofit institution” refers to loans made under the National Direct Student Loan Program. It protects government funded loans, and loans funded directly by nonprofits colleges and universities. The cases cited by Defendant that have interpreted 523(a)(8)(A)(i) so broadly are, respectfully, in error. These decisions have disregarded basic canons of statutory interpretation and found that the word “funded” means “played any meaningful part,” the word “program” means a marketing platform, and the term “nonprofit institution” means any 501(c) corporation.<sup>1</sup> Congress should not be assumed to have been this careless in its selection of words. The words “program,” “funded,” and “nonprofit institution” are the building blocks that Congress used to construct the lending programs under Title

---

<sup>1</sup> *In re Hammarstrom*, 95 B.R. 160, 165 (Bkrtcy.N.D.Cal. 1989); *In re Pilcher*, 149 B.R. 595, 600 (9th Cir.BAP1993).

1 IV of the HEA. Congress knew why it was using those terms and not others. *In re*  
2 *Murphy*, 282 F.3d 868, 872 (5<sup>th</sup> Cir. 2002) (stating that § 523(a)(8) should be  
3 harmonized with the Higher Educational Act). Once properly read in conformity  
4 with the HEA, it is clear that the NCSLT Loan cannot fit within the statute.  
5

6  
7 Second, even if Defendant’s statutory construction were sound, its evidence  
8 fails to support its claims for at least two reasons: (1) there is insufficient evidence  
9 that TERI was a legitimate nonprofit; (2) there is no evidence TERI guaranteed the  
10 NCSLT Loan. First, where a statute employs the word “nonprofit,” courts inquire  
11 into the entity’s character to determine whether was operated for charitable or  
12 commercial purposes. *In re Golden*, 596 B.R. 239, 266–67 (Bkrtcy. E.D.N.Y. 2019)  
13 (categorizing as a question of fact whether TERI was “a *bona fide* nonprofit  
14 institution” or a division of “the First Marblehead Corporation.”). Tellingly, the IRS  
15 prohibits tax-exempt entities from making loans with characteristics like the NCSLT  
16 Loan,<sup>2</sup> and public financial records suggest that TERI was being used as a  
17 commercial mechanism to enhance the profitability of the First Marblehead  
18 Corporation. *P.L.L. Scholarship Fund v. C.I.R.*, 82 T.C. 196, 200 (Tax Court 1984)  
19 (nonprofit operated “to enhance the profitability” of for-profit entity). Second, even  
20 if “guaranteeing” a loan could be construed as funding, there is no evidence TERI  
21  
22  
23  
24  
25  
26

---

27  
28 <sup>2</sup> See REVENUE RULING, 63-220, 1963 WL 13199 (IRS 1963). This would seem to be  
mostly an honor system. See Rossman, Mathew, *Evaluating Trickle Down Charity*, 79 Brook.  
L. Rev. 1455, 1495 (2104) (“Due to limited staffing, the IRS Tax Exempt Division typically  
reviews less than two percent of the 990s it receives.”)

1 actually guaranteed the NCSLT Loan or that that Guaranty Agreement was even  
2 legally operative when Plaintiff entered into the transaction at issue.  
3

## 4 **II. BACKGROUND**

5 Admittedly, there is significant case law in the Defendant's favor. This case law  
6 has been built up and expanded over the last thirty years, and now allows for-profit  
7 commercial lenders to share in an exception from discharge that Congress reserved  
8 for public and nonprofit entities that participated in the HEA. Section  
9 523(a)(8)(A)(i) was never intended to apply to commercial transactions. A brief  
10 review of the developments that led to section 523(a)(8) will demonstrate this.  
11  
12

### 13 **A. Nonprofits, the Higher Education Act, and the Quid Pro Quo**

14  
15 Massachusetts is credited with pioneering the guaranteed student lending  
16 model when it created the Massachusetts Higher Education Assistance Authority  
17 ("MHEAA") in 1957.<sup>3</sup> Until that time, student loans could generally only be  
18 obtained from banks on commercial terms.<sup>4</sup> The MHEAA proposed to guarantee the  
19 loans against default in exchange for banks agreeing to make low-interest, unsecured  
20 loans to students. The MHEAA was successful, and other states created similar state  
21  
22  
23  
24  
25

---

26 <sup>3</sup> Tobin, Bradley *Nonprofit Student Lenders and Risk Retention*, 64 Baylor L. Rev. 158,  
27 178–79 (2012) ("The first guaranteed student loans were issued in Massachusetts in 1957.")  
(hereinafter "Tobin").

28 <sup>4</sup> REVENUE RULING, 63-220, 1963 WL 13199, at \*1 (IRS 1963) ("Loans from commercial  
lending agencies in the area are available to students, but only on a secured basis and at commercial  
or conventional rates of interest, which vary depending upon the size of the loan.").

1 agencies and nonprofits.<sup>5</sup> The IRS was soon called upon to examine this somewhat  
2 unorthodox practice (charities did not historically lend money at interest). In 1961,  
3 the IRS approved this lending model, and concluded that public interest and  
4 nonprofit groups could make or guarantee interest-bearing loans to students provided  
5 the interest rate was below market terms, the loans were made in a non-commercial  
6 manner, and were only made to students of genuine need (“Nonprofit Student  
7 Loans”).<sup>6</sup> Congress expanded on these state-programs through the passage of the  
8 Higher Education Act of 1965 (“HEA”).

9  
10  
11  
12 The HEA authorized two major lending programs: the Guaranteed Student  
13 Loan Program (“GSL”) and the National Direct Student Loan Program (“NDSL”)  
14 (collectively the “Title IV Programs”). The mechanics of these programs are  
15 important to understand because Congress used the same language in codifying both  
16 the HEA and section 523(a)(8). The GSL provided guarantees, insurance, and  
17 interest subsidies to participants in the existing state lending network.<sup>7</sup> GSLs were  
18 administered by commercial lenders, educational institutions, state agencies or  
19 nonprofits, and the federal government. The commercial lender funded the loan in  
20  
21  
22  
23

---

24  
25 <sup>5</sup> See Tobin at 179.

26 <sup>6</sup> See REVENUE RULING 61-87, 1961 WL 12644 (1961) and 63-220, 1963 WL 13199 (1963).  
27 The federal government had also begun smaller lending programs geared towards veterans, and  
28 those pursuing careers in math and science under the National Defense Education Act.

<sup>7</sup> 20 U.S.C. § 1071 (“The purpose of this part is to enable the Secretary . . . to guarantee a  
portion of each loan insured under a program of a State.”). The GSL was actually an umbrella  
term for four different programs whose loans were either guaranteed by the government, or else  
reinsured. *See Oliver Schools, Inc. v. Foley*, 881 F.Supp. 847, 850 (W.D.N.Y. 1994)

1 an amount permitted by the educational institution, which was either guaranteed by  
 2 a state agency or nonprofit and reinsured by the government. If a student defaulted,  
 3 the state agency or nonprofit would purchase the loan from the lender and try to  
 4 rehabilitate the borrower. If the agency was unsuccessful, it would assign and obtain  
 5 reimbursement on the note from the federal government.<sup>8</sup> NDSLs, which were a  
 6 continuation of earlier “direct lending” programs under the National Defense  
 7 Education Act, were made directly by educational institutions from a revolving trust  
 8 of capital that was 90% funded by the federal government and 10% funded by the  
 9 school itself.<sup>9</sup> As with the GSL, the institution serviced the loan. If the borrower  
 10 defaulted, the loan was then assigned to the government.<sup>10</sup>

15 When the media began reporting stories of graduate students discharging their  
 16 Title IV Loans shortly after graduation, the reaction was swift and furious.<sup>11</sup> This  
 17 anger led Congress to codify the non-dischargeability of GSLs as part of the HEA  
 18 itself in 1977. This came to be known as the *quid pro quo*: Congress would offer  
 19 low-interest educational loans on non-commercial terms,<sup>12</sup> and in exchange, students

---

23 <sup>8</sup> *Becirevic v. Navient Solutions, LLC*, 2019 WL 4046770, at \*1 (E.D. Tex. 2019) (describing  
 24 the interplay between the various agencies under the GSL).

25 <sup>9</sup> The NDSL began as the National Defense Student Loan, and ultimately became the Perkins  
 26 Loan. See *Matter of Williamson*, 25 B.R. 49, 51 (Bkrcty.Ga. 1982).

27 <sup>10</sup> See 20 U.S.C. 1087gg.

28 <sup>11</sup> *Matter of Bruce*, 3 B.R. 77, 82 (Bankr. Ill. 1980) (contrasting the “arrogance of former  
 students” with those who “lived through the Depression” and paid taxes for the “student loans.”)

<sup>12</sup> See H.R. Rep. 95-595, 136, 1978 U.S.C.C.A.N. 5963, 6097 (“In contrast, other federal and  
 commercial loans are usually made based on a financial analysis of the borrower . . . [t]hese  
 differences . . . make the GSL Programs unique.”).

1 would surrender the ability to discharge these loans during the first five years of  
 2 repayment. *In re Brunner*, 46 B.R. 752, 755 (S.D.N.Y. 1985), *aff'd* 831 F.2d 395  
 3 (2<sup>nd</sup> Cir.) (“Those who might obtain loans only at exorbitant rates are similarly able  
 4 to obtain low cost, deferred loans. In return for this largesse [] the government exacts  
 5 a *quid pro quo*.”).<sup>13</sup> Congress thereafter enacted 439A of the Higher Education Act:

8 A debt which is a loan insured or guaranteed under the authority of this part. //  
 9 20 USC 1087–3. // Sept. 30, 1977 (“1977 Version”)

10 The 1977 Version notably applied only to “this part,” which was the GSL.<sup>14</sup>  
 11 Significant debate followed, as some Members worried that 439A had been an  
 12 overreaction, while others thought it had not gone far enough. Around the same time,  
 13 the Senate was preparing a draft of the new Bankruptcy Code, and proposed a  
 14 broader provision that would proscribe discharge not just for the GSL, but for “any  
 15 educational loan.”<sup>15</sup> Competing House and Senate bills were resolved through  
 16 committee in 1978, and it was agreed that the new discharge exception would cover  
 17  
 18  
 19  
 20

---

21 <sup>13</sup> See also *In re Merchant*, 958 F.2d 738, 740 (6th Cir. 1992) (“[U]nlike commercial  
 22 transactions where credit is extended based on the debtor's collateral, income, and credit rating,  
 23 student loans are generally unsecured.”); *In re Courtney*, 79 B.R. 1004, 1011 (Bkrtcy.N.D.Ind.  
 24 1987) (“The legislation creating the various student loan programs bars loan-granting institutions  
 25 from applying more traditional standards for evaluating of credit-worthiness; it also locks lenders  
 26 into fixed and relatively low interest rates.”).

26 <sup>14</sup> The phrase “insured or guaranteed” reflected the twin financing mechanisms under the  
 27 GSL: secondary guarantees made through existing state agencies, and direct insurance for  
 28 lenders in states without guarantor agencies, a subset of the GSL known as the FISLP. See 34  
 CFR 682.100(describing GSL and FISLP).

<sup>15</sup> Some members of the House agreed with the Senate. See H.R. REP. 95-595, 538 (“In  
 addition to loans insured or guaranteed by the Higher Education Act, my amendment would  
 include any loan designated for any educational purpose.”).

1 both the GSL, the NDSL, and any other educational loan made under state programs  
 2 or by nonprofits colleges. In 1978, Congress codified this compromise into the new  
 3 Bankruptcy Code:

4 “to a governmental unit, or a nonprofit institution of higher education, for an  
 5 educational loan”<sup>16</sup> (“1978 Version”)

6  
 7 Although this was close, the wording was deceptively narrower than had been  
 8 agreed.<sup>17</sup> Congress had agreed that the exception would cover all GSLs, NDSLs, and  
 9 loans made by state governments and educational institutions. As written, the 1978  
 10 Version would only except from discharge those GSLs and NDSLs owed directly to  
 11 governmental units, or nonprofit institutions of higher education. As discussed  
 12 above, GSLs were most often held by commercial banks. Thus, borrowers could  
 13 discharge their GSLs by declaring bankruptcy before they had defaulted, and before  
 14 the GSL had been assigned to a governmental unit.<sup>18</sup> In addition, NDSLs were made  
 15 by four types of “institutions” (1) nonprofit institutions of higher education (*i.e.*,  
 16 nonprofit colleges); (2) proprietary institutions of higher education (*i.e.*, for-profit  
 17 colleges); (3) postsecondary vocational institutions; (4) vocational schools (*i.e.*,  
 18  
 19  
 20  
 21  
 22  
 23

---

24 <sup>16</sup> P.L. 95-598, Nov. 6, 1978, 92 Stat 2549.

25 <sup>17</sup> There was also a timing problem with P.L. 95-598, which immediately struck 439 of the  
 26 HEA, but its authorization of the Bankruptcy Code was not scheduled to take effect until October  
 27 1979, creating a fifteen-month gap in coverage. To prevent this accident, Congress enacted a  
 28 stopgap provision: “for a loan insured or guaranteed under the authority of part B of title IV of  
 the Higher Education Act of 1965.” (P.L. 96-56. Aug 14, 1979).

<sup>18</sup> For a more comprehensive history of this debate and amendments, *see In re Adamo*, 619  
 F.2d 216, 220 (2<sup>nd</sup> Cir. 1980) and the Congressional record at S. REP. 96-230.

trade schools).<sup>19</sup> Thus, borrowers who attended for-profit colleges, or vocational institutions could discharge their NDSLs prior to default because they were not then owed to a “governmental unit” or “nonprofit institution of higher education.”

Congress rewrote the statute to reframe the focus on the character of the loan:

for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit, or nonprofit institution of higher education.<sup>20</sup> (“1979 Version”)

The 1979 Version tracked the mechanics of the GSL and the NDSL. Congress took that language directly from Title IV. The phrase “loan made, insured or guaranteed” was frequently used to describe the GSL in other statutes..<sup>21</sup> This language would also capture educational loans made, insured or guaranteed by state and local governments.<sup>22</sup> The NDSL, codified in Part E of Title IV, contained a number of ready-made characterizations: “made under a program,”<sup>23</sup> “any program

---

<sup>19</sup> *St. George's University School of Medicine v. Bell*, 514 F.Supp. 205, 206 (D.C.D.C. 1981) (“The definition of a ‘institution for higher education’ requires among other things, that the institution ‘is accredited by a nationally recognized accrediting agency or association’, and ‘is a public or other nonprofit institution.’”)(citations omitted).

<sup>20</sup> See P.L. 96-56, Aug. 14, 1979, 93 Stat 387.

<sup>21</sup> See, e.g., 14 U.S.C. § 2772 (“[A]ny loan made, insured, or guaranteed under part B of title IV of the Higher Education Act of 1965.”).

<sup>22</sup> S. REP. 96-230, 2 (“The bill would not alter the protection from discharge which the present version of [523(a)(8)] affords to educational loans made outside the auspices of federal programs by nonprofit institutions of higher education, states and local governments.”)

<sup>23</sup> P.L. 101–239, December 19, 1989, 103 Stat 2106 (“loans made, insured, or guaranteed under part B and loans made under part E.”) Education loan repayment program, 14 U.S.C. § 2772 (“any loan made under part E of [Title IV] (20 U.S.C. 1087aa et seq.)”).

under this title,”<sup>24</sup> “made or funded in whole or in part,”<sup>25</sup> “any program funded in whole or in part.”<sup>26</sup> The trouble was how to ensure that all NDSLs would be protected without also giving protection to other loans made by for-profit educational institutions. If Congress replaced the term “nonprofit institution of higher education” with the more general term “institution,” that would ensure all NDSLs would be protected. But it would also allow capture loans “funded in whole” by for-profits. Instead, Congress employed both of the potential NDSL holders, “nonprofit institution of higher education” and “governmental unit” to define this type of loan. This wording ensured that the statute was neither over or under-inclusive and would except from discharge the three and only three loan types that had been agreed upon in Committee. First, NDSLs made by for-profit colleges would be non-dischargeable as loans “funded in . . . part by a governmental unit.” Second, NDSLs made by nonprofit colleges would be non-dischargeable as loans “funded in . . . part by a governmental unit or nonprofit institution of higher

---

<sup>24</sup> PL 96–374, Oct 3, 1980, 94 Stat 1367 (“Sec. 487 (a) In order to be an eligible institution for the purposes of any program authorized under this title . . . [t]he institution will use funds received by it **for any program under this title** solely for the purposes specified in, and in accordance with, the provisions of that program.”)

<sup>25</sup> S. REP. 96-230, 3, 1979 U.S.C.C.A.N. 936, 938 (“[M]ade or funded in whole or in part by a governmental unit or a nonprofit institution of higher education.”)

<sup>26</sup> See P. L. 99–498, 100 Stat. 1268, 20 U.S.C. 1087uu (“Student financial assistance **received from any program funded in whole or part under Title IV of the Higher Education Act of 1965**, including the Pell Grant, Supplemental Educational Opportunity Grant, State Student Incentive Grants, National Direct Student Loan, PLUS, College Work Study [] programs.”)(emphasis added).

1 education.” And lastly, other loans made by nonprofit colleges would be non-  
 2 dischargeable as loans “funded in whole by a nonprofit institution of higher  
 3 education.”<sup>27</sup>

4  
 5 Those were the last major structural changes done to what is today section  
 6 523(a)(8)(A)(i). One other minor change occurred in 1984 that had an outsized  
 7 consequence to student debtors. During the early 1980s, the circuit courts wrestled  
 8 with the question of whether a seminary fell within the scope of “higher  
 9 education.”<sup>28</sup> Congress thought this merited a change in section 523(a)(8):

12 “[D]eleting ‘of higher education’ enlarges the scope of the  
 13 nondischargeability exception and is therefore substantive to that extent. It is  
 14 a modest enlargement, however, in that the claimant must be a nonprofit  
 15 institution and the loan must be one for an educational loan. The change  
 16 eliminates litigation over the question whether a seminary, for example, is an  
 17 institution of higher education. The amendment is thus to some extent at least  
 clarifying.”<sup>29</sup>

18 Contrary to what later case law would conclude,<sup>30</sup> this was only a “modest  
 19 enlargement.” And the plain language supports that statement. Congress deleted the  
 20 phrase “of higher education,” but this did not change the meaning of the term  
 21

---

23 <sup>27</sup> 34 CFR § 674.1 (“The National Direct Student Loan Program (NDSL) provides low-  
 24 interest loans in institutions of higher education to help financially needy students.”)

25 <sup>28</sup> See *Equal Employment Opportunity Commission v. Southwestern Baptist Theological*  
 26 *Seminary*, 651 F.2d 277, 279 (5 Cir. 1981) (“This case requires us to balance the interest of the  
 27 federal government in enforcing Title VII against the first amendment rights of a religious  
 institution of higher learning.”); *New Jersey-Philadelphia Presbytery of the Bible Presbyterian*  
*Church v. New Jersey State Bd. of Higher Educ.*, 654 F.2d 868, 885 (3<sup>rd</sup> Cir. 1981).

28 <sup>29</sup> See Plaintiff’s **Exhibit 11**, Bankruptcy Improvement Act: Hearing on P.L. 98-353 Before  
 the S. Comm. on Judiciary, at 328 (April 6, 1983) (Comments on Subtitle I of S. 445).

<sup>30</sup> *In re Goldstein*, 2012 WL 7009707, at \*3 (Bkrtcy.N.D.Ga. 2012)

1 “nonprofit institution.” *See McClure v. U.S.*, 95 F.2d 744, 750 (9th Cir. 1938)  
 2 (“Where an amendment leaves certain portions of the original act unchanged, such  
 3 portions are continued in force with the same meaning and effect they had before  
 4 amendment.”). The term “institution” means a “scholastic institution” rather than  
 5 any organization or corporation.<sup>31</sup> The HEA statutes and regulations consistently use  
 6 the term “institution” as a shorthand for college, university or vocational school.<sup>32</sup>  
 7

8 Congress would continue to amend 523(a)(8) over the next three decades.  
 9  
 10 Notwithstanding certain smaller alterations, and larger changes for the “undue  
 11 hardship” timeline, the language in the 1984 version of 523(a)(8) is essentially the  
 12 current version of 523(a)(8)(A)(i). In 2010, Congress ended the GSL, and all federal  
 13 loans are now made through the Direct Program. The Direct Program, like the  
 14 NDSL, is directly funded by the government, and because of the precision employed  
 15 by Congress in drafting this statute (which on first glance does seem confusing and  
 16 disjointed), these loans remain protected under 523(a)(8)(A)(i).  
 17  
 18  
 19  
 20  
 21  
 22

---

23  
 24 <sup>31</sup> 34 C.F.R. § 668.1 (“[T]his part establishes general rules that apply to an institution that  
 25 participates in any student financial assistance program authorized by Title IV of the Higher  
 26 Education Act of 1965. . .[a]s used in this part, *an ‘institution’ includes*—(1) An institution of  
 27 higher education as defined in 34 CFR 600.4 (2) A proprietary institution of higher education as  
 defined in 34 CFR 600.5; and (3) A postsecondary vocational institution as defined in 34 CFR  
 600.6.”) (emphasis added).

28 <sup>32</sup> 34 C.F.R. § 668.14, Program Participation Agreement (“An institution may participate in  
 any Title IV, HEA program, other than the LEAP and NEISP programs, only if the institution  
 enters into a written program participation agreement with the Secretary, on a form approved by  
 the Secretary.”). *See also* 34 C.F.R. § 668.26, End of an Institution’s Participation in the Title IV.

## B. Alternative Loans, Multi-Party Agreements, and TERI

The creation of the GSL in 1965, and the Student Loan Marketing Company in 1972, had brought dozens of new actors into the lending marketplace: commercial banks, bond traders, state agencies and quasi-state agencies.<sup>33</sup> As the cost of higher education continued to increase, these entities began to develop new loan programs. Between 1983 and 1997, lenders and nonprofits sought approval from the IRS for a variety of new programs made through increasingly complex organizational structures such as the Alternative Loan Program,<sup>34</sup> and Supplemental Loan Program,<sup>35</sup> and other loans made through “multi-party agreements.”<sup>36</sup> The IRS approved these programs on condition that the fundamental character of the loans conform to the Revenue Rulings from 1961 and 1963.<sup>37</sup> The nonprofits assured the IRS that their involvement would act as a “watchdog” to prevent the ALP and SLP from becoming purely commercial operations.<sup>38</sup>

---

<sup>33</sup> *Student Loan Marketing Ass’n v. Riley*, 104 F.3d 397, 400 (D.C. Cir. 1997) (“Sallie Mae was established in 1972 to provide lender banks with greater liquidity.”).

<sup>34</sup> See PLR 9740004, 1997 WL 607382 (IRS 1997) (“The ALP loans will have lower interest rates, lower origination fees, lower guaranty fees, and less restrictive credit criteria than would be required by conventional lenders.”).

<sup>35</sup> *In re Bolen*, 287 B.R. 127, 128–29 (D. Vt. 2002) (“The first two types of loans are federally subsidized, but the third is not.”)

<sup>36</sup> PLR 9237027, 1992 WL 223684 (IRS 1992) (multi-party coordination agreement).

<sup>37</sup> REVENUE RULING 61-87 (nonprofits can make or guarantee, “unsecured loans to students at low rates of interest.”).

<sup>38</sup> See PLR 9237027 (characterizing nonprofit’s “role in this process as watchdog for the students” who “and ensures that the commercial providers do not unilaterally dictate the availability of credit or its terms.”). The IRS did refuse some of these proposals. See General Counsel Memorandum, 1987 WL 430206, at \*9 (concluding that nonprofit’s proposed

1           TERI was one of these new entities, which was created in 1985 with a grant  
2 from the Massachusetts Higher Education Assistance Authority (“MHEAA”). The  
3 MHEAA wanted to create a sister nonprofit to increase the availability of Nonprofit  
4 Student Loans. TERI sought 501(c) in order to facilitate the origination of more  
5 low-interest student loans.<sup>39</sup> TERI’s stated mission was to ensure “every Boston  
6 student who wishes to pursue postsecondary education will secure sufficient  
7 financial aid to make this possible.”<sup>40</sup> TERI received a 501(c) exemption, and spent  
8 the next decade persuading schools and banks to participate in its guaranteed student  
9 lending program under which TERI would guarantee student loans made by  
10 commercial banks. TERI also began performing the lenders’ application processing  
11 and disbursement duties and thereby developed significant relationships in the  
12 lending community, and expertise in the back-office of loan origination. These  
13 relationships, along TERI’s ability to make non-dischargeable debt, would soon  
14 command attention from a more commercial minded enterprise.

15  
16  
17  
18  
19  
20  
21           These ALPs and SLPs and other multi-party loans began to work their way  
22 through the bankruptcy courts. To the extent these were genuine Nonprofit Loans,  
23  
24  
25

---

26 arrangement with commercial lenders to provide student loan processing services was not  
27 consistent with charitable mission and would mostly help the banks).

28           <sup>39</sup> TERI cited a number of the IRS’s Revenue Rulings & Private Letter Rulings that limit  
the loans a nonprofit can make as evidence of its tax-exempt suitability. See **Exhibit 8**, at page 4.

<sup>40</sup> *id.*

1 they may have had an equitable entitlement to discharge exception.<sup>41</sup> But it was not  
2 statutory. The ALPs and SLPs were not “made, insured, or guaranteed by  
3 governmental unit,” nor were they “funded in whole or in part by a nonprofit  
4 institution.” They were, at most, guaranteed or else facilitated by a 501(c)  
5 corporation. Those distinctions were quickly rejected by the courts. In  
6 *Hammarstrom*, the court concluded that if a commercial bank had a multi-party  
7 arrangement to sell student loans to a 501(c), then any student loan made by that  
8 bank under that arrangement, whether or not the loan was actually sold to the 501(c)  
9 under the arrangement, should be found held non-dischargeable as a loan funded in  
10 part by a “nonprofit institution.” This would further Congress’ intent because the  
11 term “funded” meant where a nonprofit had “meaningfully participated.”<sup>42</sup> In  
12 *Pilcher*, the court concluded that if a commercial student loan was offered in the  
13 same brochure as federally insured loans, and a nonprofit corporation assisted in  
14 facilitating all three loans, then the commercial loan is just as non-dischargeable as  
15 the federally insured loans because all three were made under the same “program.”  
16  
17  
18  
19  
20  
21  
22  
23  
24

---

25 <sup>41</sup> Before 1976, courts did refuse to discharge student loans largely on equitable grounds.  
26 The loans were deemed unprovable because of their repayment plans and forgiveness options.  
27 The NY Courts of Appeals summarized them in much the same terms as Congress, “this loan  
28 agreement is not a commercial transaction.” *State v Wilkes*, 41 N.Y.2d 655, 659 (N.Y. 1977)  
(applying pre-1976 Bankruptcy Act).

<sup>42</sup> *In re Hammarstrom*, at 165 (“Congress intended to include within section 523(a)(8) all  
loans made under a program in which a nonprofit institution plays any meaningful part in  
providing funds.”). *Hammarstrom* assumed that a corporation and institution were coterminous.

1 And it was this “program” that the nonprofit had indirectly “funded” with  
 2 administrative, financial and marketing services.<sup>43</sup>  
 3

### 4 **C. FMC, Direct-to-Consumer Loans, and the National Collegiate Trust**

5 The First Marblehead Corporation was founded in 1991 as a sort of student loan  
 6 middle-man. It acted as a broker between commercial lenders and the bond markets  
 7 and also designed ALPs for commercial banks. FMC pioneered (or helped pioneer)  
 8 a new lending channel that would bypass the financial aid office and market loans  
 9 directly to the students.<sup>44</sup> This method eliminated bureaucratic red-tape under the  
 10 HEA, and stopped schools from reducing loan amounts that exceeded a student’s  
 11 actual financial need (“DCT Loans”). DTC Loans had higher interest rates, higher  
 12 default rates, and in many ways were more similar to personal loans than student  
 13 loans.<sup>45</sup> At some point in the late 1990s, FMC embarked on a mission to create a  
 14 new type of student loan that combined the profit margins of DTC Loans with the  
 15 public good will and non-dischargeability of Nonprofit Loans.  
 16  
 17  
 18  
 19  
 20  
 21  
 22

---

23 <sup>43</sup> *In re Pilcher*, at 600 (holding that a nonprofit may be said to “fund” a loan program if it  
 24 assists with the marketing, production of application materials, processing, servicing, and  
 25 guaranteeing of loans). *Pilcher* seems to at least suggest that a creditor can commingle federal and  
 private resources.

26 <sup>44</sup> See also Dash, Eric, *Reeling In the College Bound*, NY Times, (Sept. 2, 2007)  
 available at: <https://www.nytimes.com/2007/09/02/business/02jabba.html>

27 <sup>45</sup> See CFPB, REPORT: PRIVATE STUDENT LOANS, 2012 (“First Marblehead estimated that  
 28 loans in its legacy portfolio in its best credit segment would default at a lifetime rate of 10.4%  
 while its lowest credit quality loans (predominantly DTC) would default at a lifetime rate of  
 52.3%.”), available at: <https://www.consumerfinance.gov/data-research/research-reports/private-student-loans-report/>.

1 To execute this goal, FMC entered into a “strategic partnership” with TERI in  
 2 2001. This partnership was memorialized in a confidential Master Servicing  
 3 Agreement (“MSA”) that consolidated most of TERI’s employees and assets into a  
 4 new FMC subsidiary called the First Marblehead Education Resources (“FMER”).<sup>46</sup>  
 5 FMER took control over TERI’s lending programs, changed it into a DTC model,  
 6 restructured them on commercial terms, and expanded them to more banks.<sup>47</sup>  
 7 Although TERI remained formally contracted to perform the loan processing and  
 8 disbursement for the lenders, FMC assumed these duties under the MSA.<sup>48</sup> FMC  
 9 also arranged to purchase these loans from the lenders and securitize them for resale  
 10 on the secondary market through the National Collegiate Student Loan Trusts. FMC  
 11 became a publicly traded corporation in 2003 and over the next five years FMC  
 12 would originate nearly \$20 billion in NCSLT Loans under increasingly subprime  
 13 conditions.<sup>49</sup> These credit characteristics led to a massive defaults, but FMC’s

---

21 <sup>46</sup> See **Exhibit 6**, First Marblehead Corporation, 2006 Annual Report, at F-9 (stating that  
 22 “First Marblehead Education Resources, Inc. (FMER),” provided “outsourced loan origination,  
 23 customer service, default prevention, default processing and administrative services to TERI.”).

24 <sup>47</sup> Compare Plaintiff’s **Exhibit 8** (TERI’s statements to IRS) with Defendant’s **Exhibit A**  
 25 (NCSLT TILA Form). Before 2001, TERI made loans through the schools. *See In re Stein*, 218  
 26 B.R. 281, 284 (Bkrtcy. D. Conn. 1998) (stating that the subject debt was guaranteed by “The  
 27 Education Resources Institute, Inc. (TERI)” and that the ‘proceeds of the loan were paid directly  
 28 to the University of Chicago in the form of tuition.’”).

<sup>48</sup> *In re The Education Resources Institute, Inc.*, 442 B.R. 20, 21 (Bkrtcy. D. Mass. 2010)  
 (“TERI, in 2001, outsourced substantially all of its loan-related and administrative services to  
 First Marblehead.”).

<sup>49</sup> *In re The First Marblehead Corp. Securities Litigation*, 639 F.Supp.2d 145, 149(D.  
 Mass. 2009) (“First Marblehead’s credit guidelines were being ‘bent’ and applicants were  
 authorized to take out excessive loans with terms beyond [FMC’s] historical criteria. According

1 apologists reassured investors there was nothing to worry about, “Remember, the  
 2 loans are not dischargeable in bankruptcy, so there’s *never* a time when it’s not  
 3 worth the lender’s time and effort to keep dunning.”<sup>50</sup> When Moody’s downgraded  
 4 TERI’s credit-rating in 2008, the NCSLTs were effectively exposed as consumer-  
 5 credit junk bonds masquerading as investment grade securities.<sup>51</sup> TERI declared  
 6 bankruptcy, and disclaimed personal knowledge of its own financial disclosures  
 7 because it was reliant on FMC to provide accurate information.<sup>52</sup> The NCSLTs  
 8 continued taking judgments from debtors who, unlike the bond traders and ratings  
 9 analysts, remained unaware that their “nonprofit education loans” were in fact just  
 10 subprime consumer credit.

### 15 **III. ARGUMENTS AND POINTS OF AUTHORITY**

#### 16 **A. Summary of Argument**

17  
 18 Section 523(a)(8)(A)(i) was codified by Congress to protect the GSLs, NDSLs  
 19 and certain other government and nonprofit loans. Although the statute and student  
 20

21  
 22  
 23 to the Former VP of Applications, the risk management department’s ‘alarm at First Marblehead’s  
 24 new approach to credit guidelines ‘was generally overlooked by [FMC’s] management.’”)

25 <sup>50</sup> *FBR’s Latest First Marblehead Downgrade Makes No Sense*, Seeking Alpha, 2007,  
 26 available at: [https://seekingalpha.com/article/55549-fbrs-latest-first-marblehead-downgrade-](https://seekingalpha.com/article/55549-fbrs-latest-first-marblehead-downgrade-makes-no-sense)  
 27 [makes-no-sense](https://seekingalpha.com/article/55549-fbrs-latest-first-marblehead-downgrade-makes-no-sense)

28 <sup>51</sup> *Moody’s Downgrades First Marblehead Student Loan Notes*, (Mar. 26, 2008),  
 available at: [https://www.moody.com/research/Moodys-downgrades-First-Marblehead-student-](https://www.moody.com/research/Moodys-downgrades-First-Marblehead-student-loan-notes--PR_151806)  
[loan-notes--PR\\_151806](https://www.moody.com/research/Moodys-downgrades-First-Marblehead-student-loan-notes--PR_151806)

<sup>52</sup> See **Exhibit 10**, TERI’s Statement of Financial Affairs at 142 (“FMC manages many  
 of the Debtor’s contractual relationships with third parties . . . TERI has relied on the information  
 provided to it by FMC and TERI has not independently verified the accuracy.”).

lending have evolved, the “made under any program funded” should not be expanded to meet the changing marketplace. That language has adequately protected every new federal program since 1978 but it cannot be expanded to assist Defendant. The NCSLT Loan does and never has fit within that language for three reasons. First, section 523(a)(8)(A)(i) does protect strictly for-profit entities. Second, Defendant has failed to demonstrate that TERI was a “nonprofit” as that term is used in section 523(a)(8). Third, there is no evidence that TERI actually guaranteed the NCSLT Loan.

**B. Section 523(a)(8)(A)(i) does not except from discharge high-interest commercial loans made and held by for-profit entities**

Defendant argues that the NCSLT Loan is an educational loan because it is a credit-tested commercial loan that was guaranteed by TERI.<sup>53</sup> But section 523(a)(8)(A)(i) only applies to low-interest loans made under the HEA, by state governments, or directly by nonprofit scholastic institutions. This is most easily shown by examining two of the statutory terms that Defendant relies upon. First, the term “funded” is not synonymous with “guaranteed.” The statute itself refers to a “loan made, insured or guaranteed by a governmental unit” in one clause,

---

<sup>53</sup> There is also a question as to whether the NCSLT Loan can even be classified as an “educational loan.” The NCSLT Loan was an arm’s length consumer credit transaction made under the UCC at 12% interest and required a \$3,149 origination fee and a cosigner. *See, e.g. Matter of Roberson*, 999 F.2d 1132, 1135–36 (7th Cir. 1993) (“E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners.”); *In re Campbell*, 547 B.R. 49, 60 (Bkrtcy.E.D.N.Y. 2016)(discharging student debt because it was “a consumer loan extended by a for-profit actor” made at “arm’s length” and “evaluated through a credit-scoring model.”). *See also supra* note 13.

1 immediately followed by, “or made under any program funded in whole or in part  
 2 by a governmental unit or nonprofit institution” is alone, evidence that “made,  
 3 insured or guaranteed” has a separate and distinct meaning from “funded.” *Bates v.*  
 4 *United States*, 522 U.S. 23, 29–30 (1997) (“[W]here Congress includes particular  
 5 language in one section of a statute but omits it in another section of the same Act,  
 6 it is generally presumed that Congress acts intentionally and purposely in the  
 7 disparate inclusion or exclusion.”). The term “funded” refers to the direct funding  
 8 mechanism under the NDSL that was designed for the NDSL and now covers the  
 9 DLP. Congress excepted from discharge any loan either made, insured, guaranteed  
 10 or funded by a governmental unit. But a nonprofit institution had to fund the loan  
 11 (in whole or part).<sup>54</sup> Second, the term “nonprofit institution” is not synonymous with  
 12 a 501(c) corporation. In fact, Congress defined other entities in the Code with respect  
 13 to 501(c) status.<sup>55</sup> The term “institution” in section 523(a)(8)(A)(i) means a  
 14 scholastic institution such as a college or university.”<sup>56</sup> TERI might have qualified  
 15 as a “philanthropic organization” under the HEA, which is defined as a 501(c) that  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23

---

24 <sup>54</sup> In *O’Brien*, the court concluded TERI had funded the loan in part because TERI had  
 25 performed on the guarantee and bought the loan. *In re O’Brien*, 419 F.3d 104 (2<sup>nd</sup> Cir. 2005).  
 26 That is not the fact pattern in this case.

27 <sup>55</sup> See, e.g., 11 U.S.C. § 541(f) (“[P]roperty that is held by a debtor that is  
 28 a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986.”)

<sup>56</sup> See e.g., 34 CFR 668.1 (“This part establishes general rules that apply to an institution that  
 participates in any student financial assistance program authorized by Title IV.”); 34 C.F.R. §  
 675.2 (“Institution of higher education (institution).”); 34 CFR 674.8 (“To participate in  
 the NDSL program, an institution must enter into an agreement with the Secretary.”).

1 is *not* an eligible educational institution. But there is no discharge exception for  
 2 loans guaranteed by “philanthropic organizations.”<sup>57</sup>  
 3

#### 4 **C. TERI Was Not A *Bona Fide* Nonprofit under Section 523(a)(8)**

5 Defendant has failed to demonstrate that TERI was a “nonprofit.” The mere fact  
 6 that TERI was at one time a 501(c) is not relevant, or at least not dispositive.  
 7 Congress knows how to use the term “501(c)” and has done so in a number of  
 8 statutes, including the Bankruptcy Code. Where a statute employs the word  
 9 “nonprofit” without defining it as a 501(c), courts conduct an independent inquiry  
 10 into the entity’s character to determine whether it “actually operates as a nonprofit,  
 11 irrespective of its tax-exempt status.” *Zimmerman v. Cambridge Credit Counseling*  
 12 *Corp.*, 409 F.3d 473, 475–76 (1<sup>st</sup> Cir. 2005).<sup>58</sup> To make this determination, courts  
 13 analyze whether the entity provided any private benefit or inurement to commercial  
 14 entities, engaged in more than insubstantial commercial activity, or otherwise  
 15 conducted “suspect transactions.”<sup>59</sup> *See TI Federal Credit Union v. DelBonis*, 72  
 16  
 17  
 18  
 19  
 20

---

21 <sup>57</sup> 20 USC § 1141(defining “philanthropic organization” as a non-profit organization that is  
 22 not an educational institution under Title IV but is a 501(C) that helps students pay for college).

23 <sup>58</sup> In *Zimmerman*, the district court dismissed a CROA lawsuit because the Defendant was.  
 24 501(C). The First Circuit reversed and instructed the trial court to examine the entity to  
 25 determine whether it was in fact operated as a nonprofit. The trial court concluded that the  
 26 defendant had engaged in a number of “suspect transactions” that enriched commercial entities,  
 27 and held it was not a nonprofit despite its 501(c) status. The First Circuit then affirmed.

28 <sup>59</sup> *See also Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1<sup>st</sup> Cir. 1981). Courts have  
 made these inquiries in a variety of contexts where the term “nonprofit” forms part of a claim.  
*See, In re Dube*, 169 B.R. 886, 892 (Bkrtcy. N.D. Ill. 1994) (bankruptcy non-dischargeability  
 proceeding); *Shinde v. Nithyananda Foundation*, 2015 WL 12732434, at \*12 (C.D. Cal. 2015)  
 (nonprofit as an element of a RICO claim); *Frank Lloyd Wright Foundation v. Kroeter*, 697  
 F.Supp.2d 1118, 1136 (D. Ariz. 2010) (nonprofit as element of common law claim and DJA).

1 F.3d at 927 (1<sup>st</sup> Cir. 1995) (“[N]o clear test for ‘determining when a nonprofit  
 2 institution is—or is not—a nonprofit institution under section 523(a)(8) of the  
 3 Bankruptcy Code’ has been formulated.”). TERI’s engaged in a number “suspect  
 4 commercial transactions with FMC, and their activities were in many places  
 5 indistinguishable.<sup>60</sup> Indeed, in a case cited by Defendant, the Southern District of  
 6 New York believed or otherwise had concluded that TERI had legally merged into  
 7 FMER.<sup>61</sup> *Est of Hawaii v. C.I.R.*, 71 T.C. 1067, 1082 (Tax Court 1979), *aff’d* 647  
 8 F.2d 170 (9<sup>th</sup> Cir. 1981) (revoking 501(c) where nonprofit “was simply the  
 9 instrument to subsidize for-profit corporations.”).

10 FMC testified that it was “in a precarious financial situation until the successful  
 11 acquisition of TERI in 2001.”<sup>62</sup> Under this acquisition, memorialized in the MSA,  
 12 TERI ceded control of its operations and mission to FMC. *See Redlands Surgical*  
 13 *Services v. C.I.R.*, 242 F.3d 904 (9<sup>th</sup> Cir. 2001) (affirming revocation of 501(c) status  
 14 where the nonprofit had “ceded effective control over the operations . . . to private

---

21  
 22  
 23  
 24 <sup>60</sup> *Lowry Hospital Association v. Commissioner of Internal Revenue*, 66 T.C. 850, 859 (Tax  
 25 Court 1976) (“The two operations were so integrally interwoven in their daily operation that only  
 the faintest outlines of a separable operating charity may be perceived.”).

26 <sup>61</sup> *In re O'Brien*, 318 B.R. 258, 259 (S.D.N.Y. 2004) (“The Loan to the Appellant was  
 27 guaranteed by First Marblehead Education Resources, Inc. f/k/a The Education Resources  
 Institute, Inc.”).

28 <sup>62</sup> *First Marblehead Corp. v. House*, 541 F.3d 36, 40 (1st Cir. 2008) (stating the FMC’s CEO  
 had testified that FMC “was in a precarious financial situation until the successful acquisition of  
 TERI in 2001.”).

parties.”). TERI transferred nearly its assets the majority of its staff over to FMC.<sup>63</sup> FMC assumed control over TERI’s loan processing, origination duties, and default claims processing.<sup>64</sup> In fact, TERI was so completely subsumed by FMC that the NCSLTs (*Defendant included*) would argue that TERI’s role in these lending programs had been reduced to that of a mere debt collector.<sup>65</sup> TERI obtained 501(c) status by representing to the IRS, *inter alia*, that its lending program would bring interest rates on student loans down from Prime +2.0% to Prime +1.5%.<sup>66</sup> The interest rates on the Plaintiff’s NCSLTs is 12.06% and included an origination fee of \$3,149.<sup>67</sup> TERI never disclosed any of these changes to the IRS, and affirmatively denied that it had reorganized itself or was engaged in any joint venture.<sup>68</sup> After the acquisition, FMC described TERI as “an important component of First Marblehead’s

---

<sup>63</sup> TERI disclosed that it had 177 employees in 2001. See **Exhibit 7**, at 6 of 292, Line 90b. FMC disclosed that it absorbed 161 of TERI’s employees in 2001. See **Exhibit 6**, FMC, 2006 Annual Report, at 54. TERI reported that it had 49 employees in 2002. **Exhibit 7**, at 42. That would mean TERI went from 177 employees, down to 16, and then back up to 49 within 12 months while representing to the IRS. that it had not “experienced liquidation, dissolution, termination or substantial contraction” in 2001 or 2002. *id* at 42, Line. 79.

<sup>64</sup> See **Exhibit 5**, First Marblehead Corporation, 2004 Annual Report at 12-14.

<sup>65</sup> See **Exhibit 2**, Disclosure Statement for the Fourth Amended Plan of TERI’s Reorganization at 29 (“The [NCSLTs] contend that . . . TERI does not own the defaulted loans but holds them ‘for collection purposes only.’”).

<sup>66</sup> See **Exhibit 8**, at page 4.

<sup>67</sup> See Defendant’s **Exhibit A**.

<sup>68</sup> See Plaintiff’s **Exhibit 7, TERI’s 990 Filings**. TERI never disclosed this “strategic partnership” to the IRS and between 2001-2003, denied that it had: “engaged in any activity not previously reported to the IRS,” or made “any changes made in the organizing or governing documents.” *id.* at 6, 42 and 74.

profitability.”<sup>69</sup> *P.L.L. Scholarship Fund v. Commissioner of Internal Revenue*, 82 T.C. 196, 200 (Tax Court 1984) (nonprofit was impermissibly operated “to enhance the profitability” of for-profit entity). FMC promoted its ability to make non-dischargeable debt through TERI as a competitive advantage over Sallie Mae and Wells Fargo.<sup>70</sup> *Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 373 (7<sup>th</sup> Cir. 1991) (“Competition with commercial firms is strong evidence of the predominance of non-exempt commercial purposes.”). TERI appears to have paid FMC nearly \$400 million above fair-market value for services under the MSA.<sup>71</sup> FMC’s financial success and failure were inextricably linked to TERI. As TERI passed from insolvency and into bankruptcy, FMC’s stock lost 91% of its value, including 36% on the day TERI sought relief under Title 11.<sup>72</sup> TERI disclaimed any responsibility for errors in its financial disclosures because FMC had given them the information,

---

<sup>69</sup> *In re The First Marblehead Corp. Securities Litigation*, 639 F.Supp.2d 145, 159 (D.Mass. 2009). (“An important component of First Marblehead’s profitability was First Marblehead’s relationship with The Education Resources Institute, Inc.”)

<sup>70</sup> **Exhibit 5**, FMC, Annual Report, 2004 at 53. (“TERI is a not-for-profit organization and, as a result, borrowers have been deemed unable to discharge in bankruptcy proceedings loans that TERI guarantees. If TERI loses its not-for-profit status . . . our business could be adversely affected.”).

<sup>71</sup> See **Exhibit 7**, IRS 990s Filings from 2002-2008. FMC charged TERI \$532 million in subcontracting fees that TERI was only paid \$147.5 million. See **Exhibit 4**, Affidavit of Willis J. Hulings at 3 (Jun. 13, 2008) (describing how TERI was only paid to process loans on a per application by the lenders but that it had to pay FMC on a fixed annual basis which caused significant financial strain and was a precipitating case of TERI’s bankruptcy). See *Texas Trade School v. C.I.R.*, 30 T.C. 642, 647 (Tax Court 1958) (nonprofit impermissibly paid above FMV to for-profit).

<sup>72</sup> *First Marblehead Sinks, Guarantor is Bankrupt* (Apr. 9, 2008), available at: <https://www.reuters.com/article/us-firstmarblehead/first-marblehead-sinks-guarantor-is-bankrupt-idUSN0833823520080409>

1 which TERI could not or would not verify.<sup>73</sup> All of this evidences that regardless  
 2 of whether it was true at the time of its initial establishment as a 501(c) that its  
 3 activities provided merely a “quite incidental private benefit to the banks,” that was  
 4 patently no longer the state of affairs during this time.<sup>74</sup>

#### 5 **D. There Is No Evidence That TERI Guaranteed the NCSLT Loan**

6  
 7  
 8 Defendant has failed to prove that TERI guaranteed the NCSLT Loan. First,  
 9 any purported guaranty provided for in the Guaranty Agreement was conditional,  
 10 and the Guaranty Agreement recites a number of conditions that had to be met before  
 11 TERI would agree to guaranty a loan in Section 2.2.<sup>75</sup> Defendant has offered no  
 12 evidence that any of these conditions were met. Second, Defendant has produced a  
 13 Deposit and Security Agreement that appears to have annulled the Guaranty  
 14 Agreement. The Guaranty Agreement states that upon default, TERI would pay the  
 15 loan’s outstanding balance to the holder, who would “endorse . . .to TERI in such  
 16 manner as to transfer to TERI all rights in and title to such Promissory Note and  
 17 Loan.”<sup>76</sup> However, under the Deposit and Security Agreement, TERI assigned any  
 18 right to retain the money collected under its subrogation rights or even the right to  
 19  
 20  
 21  
 22  
 23

---

24 <sup>73</sup> See **Exhibit 10**, TERI’s Statement of Financial Affairs at 142 (“FMC manages many of  
 25 the Debtor’s contractual relationships with third parties, including its litigation and collection  
 26 efforts. TERI has relied on the information provided to it by FMC and TERI has not independently  
 27 verified the accuracy of such information.”).

28 <sup>74</sup> Plaintiff’s **Exhibit 8**, at 2.

<sup>75</sup> Defendant’s **Exhibit B** at 6 (“Bank One must have complied with . . .Program  
 Guidelines . . .paid to TERI the Initial Guaranty Fee.”)

<sup>76</sup> See Defendant’s **Exhibit B** at 6.

1 collect back to the NCSLTs or their agents.<sup>77</sup> That transformed what may have been  
 2 a valid guarantee agreement into a mere accounting circuitry between TERI and the  
 3 Defendant. If Defendant avoided its performance on the Guaranty Agreement, it  
 4 cannot enforce its effect on Plaintiff. *Crowley v. TVSM, Inc.*, 1991 WL 267868, at  
 5 \*3 (S.D.N.Y. 1991) (“A party to a series of interrelated contracts cannot selectively  
 6 avoid those obligations it chooses to avoid, while keeping for itself the benefit of  
 7 those contracts it wishes to honor.”). This may explain why Defendant has failed to  
 8 provide any evidence that TERI honored or paid on the this supposed guaranty.<sup>78</sup>  
 9  
 10  
 11  
 12  
 13

#### 14 IV. CONCLUSION

15 For the foregoing reasons, Plaintiff requests that the Defendant’s motion be  
 16 denied.  
 17

18 Dated: January 23, 2020

/s/ Christopher R. Bush  
 Christopher R. Bush  
 Attorney for Plaintiff

---

21 <sup>77</sup> See Defendant’s **Exhibit F** at 5 (“TERI hereby pledges, assigns, and sets over to the  
 22 Owner . . .all of TERI’s rights, title, and interest in . . .all Recoveries . . .all contract and other  
 23 rights of TERI . . .to receive payment of Guarantee Fees . . .TERI hereby appoints the  
 24 Administrator . . . its true and lawful attorney . . .to ask for, demand . . .all moneys due or to  
 25 become due to TERI.”). Defendant’s **Exhibit F**. See also *Berg v. Access Group, Inc.*, 2015 WL  
 26 246338, at \*8 (E.D. Pa. 2015) (denying motion to dismiss verified complaint concerning lender’s  
 27 misrepresentation that TERI would guarantee a loan for a fee when in fact lender simply used the  
 28 TERI guaranty fee as “pricing mechanism” and kept the proceeds).

<sup>78</sup> Defendant’s only evidence consists of blank claim forms, but Defendant has not  
 submitted a form filled out by TERI or NCSLT. Defendant’s **Exhibit F** at 29-33. *In re Holguin*,  
 2019 WL 6880081, at \*7 (Bkrcty. D.N.M. 2019) (“The Court will not infer the continuing  
 effectiveness of TERI’s guaranty . . .[i]f the Guaranty Agreement was not in effect at the time  
 Plaintiff obtained her Loan, NCSLT cannot established that the Loan was part of a loan program  
 funded in part by a nonprofit institution.”)